No. 11551

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director of Immigration and Naturalization, at Seattle, Washington,
Appellant,

vs.

CHI YAN CHAM LOUIE, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.
HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

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STATEMENT

Appellee, Chi Yan Cham Louie, Chinese, then 18 years of age, was admitted to the United States at the Port of Seattle on June 17, 1927, as the minor daughter of H. F. Cham, Chinese, then and continuously since prior to July 1, 1924, having been, a domiciled merchant at Portland, Oregon, duly admitted to the United States under Article II of our Treaty with China of November 17, 1880.

STATEMENT OF THE CASE

Appellee is here in response to the Government's challenge to the Order of naturalization granted her by the Honorable Lloyd L. Black, Judge of the United

States District Court for the Western District of Washington, Northern Division. This challenge the Government bases upon the theory that appellee's original admission was under the Act of Congress of May 6, 1924, rather than under Article II of the Treaty of 1880, and that such admission was not for permanent residence.

ARGUMENT

We think it well, on the threshold of the argument, to be reminded that the expressed two-fold purpose of the treaty was: First, to "limit or suspend, but not to absolutely prohibit" the coming of Chinese laborers; second, to exempt all other classes from this limitation; which (second) provision the treaty emphasizes in this express language—"other classes not being included in the limitations."

This right of unrestricted residence of all "other" classes is "copper-rivited" by the treaty in

> "ARTICLE II
>
> "Chinese subjects, whether proceeding to the United States as students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States *shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.*" (Italics ours)

"Free will" is defined in Webster's Law Dictionary as the power of directing our own action without constraint by necessity or fate; voluntariness; spon-

taneoness. "Free" is defined in Black's Law Dictionary as not subject to legal restraint of another. "Unrestrained; having power to follow the dictate of his own will; not subject to the dominion of another. Enjoying full civic rights."

"Will" is defined in Black's Law Dictionary as wish; desire; pleasure; inclinational; choice; the facility of conscious, especially of deliberate, action.

"Immunity" is defined by the dictionary as freedom from duty or penalty.

It would be difficult to find words to more definitely define any human being as a completely free agent in his movements than the words here used.

Pertinent to the point that our policy of the period on the subject was directed against Chinese laborers only, is the veto message of then President Hayes of March 1, 1879, returning to the Congress a measure "To restrict the immigration of Chinese to the United States," the act applying indiscriminately to Chinese of all classes.

The President's study of the subject developed the fact that Chinese were brought here as contract laborers—"a servile importation"—as the President put it (Messages and Papers of the Presidents, by Richardson) Vol. VII, page 514, at page 517.

This was the atmosphere in which the year following was brought to conclusion our treaty with China of 1880 limiting the admission of Chinese to laborers, extending to all other Chinese the right "to go and come of their own free will and accord."

Without raising the question of good faith in this

action, or even entertaining an interrogative thought in that direction, it seems strange that after two-thirds of a century of continued recognition of those of appellee's class as permanent residents, there should now be selected as the victim of an inquiry this appellee, of whom Judge Black in his oral decision said:

> "From the standpoint of public policy, a girl who came here as a minor in 1927 as the daughter of a Chinese merchant who came here long before under the treaty, and who married an American citizen in 1941, is certainly as promising material for good citizenship as one who came to the United States yesterday as an immigrant."

And Judge Black followed with this further observation which we commend to the court:

> "Under the decisions of the Supreme Court of the United States and of the Circuit Court of Appeals as I read them, and the obligations we have to comply with the spirit of the treaty, it seems to me both legally, and in honor as a matter of public policy, this petitioner should be permitted to take the examination touching upon her knowledge of the Constitution and laws of the land."

Judge Black in this expression adopted the characterization by the eminent Mr. Justice Holmes of a treaty as the nation's highest engagement, his language being:

> "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution; while treaties are declared to be such when made under the authority of the United States."

Missouri v. Holland, 252 U.S. 415.

The clearly expressed purpose of this treaty is to exempt from its limitations all classes of Chinese other than laborers.

> "A treaty is to be executed in the utmost good faith, with a view of making effective the purpose of the high contracting parties."
>
> *Sullivan v. Kidd*, 254 U.S. 433.

And is to be construed favorably to the rights claimed under it:

> "A treaty is to be construed in a broad and liberal spirit, and where two constructions are possible, one restrictive of the rights that may be claimed under it and the other favorable to them, the latter is to be preferred."
>
> *Asakura v. Seattle*, 265 U.S. 332.

Likewise, because of the comparative strength of these contracting nations, any doubt as to construction of the treaty is to be resolved in favor of China:

> "A treaty between a superior and an inferior nation should be construed in favor of the latter."
>
> *Choctaw Nation v. United States*, 119 U.S. 1.

On the subject of the "Constitutional duty of the President to recommend to the consideration of Congress" such measures as he may judge necessary," President Grover Cleveland in a message to the Congress of March 1, 1886, said:

> "In no matters can the necessity of this be more evident than when the good faith of the United States under the solemn obligation of treaties with foreign powers is concerned."
>
> Messages and Papers of the Presidents, by Richardson, Vol. VIII, page 383.

Throughout the existence of our government it has been our commendable policy to encourage citizenship of aliens:

> "In view of the fact that these people seek the United States for the purpose of establishing themselves and of acquiring American citizenship, it would seem to be the office of wise statemanship to facilitate their admission and to provide for their incorporation into the body politic as speedily as may be prudent."
>
> Morse on "Citizenship by Birth and Naturalization" (1881) preface, page VIII.

In harmony with this policy, we officially provide schools and textbooks in its promotion.

This right to naturalization we have recently extended to aliens of petitioner's race. In what good conscience may we now justify administrative restrictions to this expressed legislative will? Shall we lend legitimacy to that familiar flippant phrase "a Chinaman's chance?"

The treaty interpretation as here contended for is supported by an unbroken line of judicial decisions beginning with the *Mrs. Gui Lim* case, 176 U.S. 459, practically contemporaneously with the treaty conclusion.

In that case the court held that the treaty exemption of merchants from its restrictive provisions, included by implication their wives and minor children.

Contemporaneously with its enactment, the Immigration Act of July 1, 1924, majored by appellant in its brief, was passed upon by the Supreme Court in *Cheung Sum Shee, et al. v. Nagle*, 268 U.S. 336, 45 S.

Ct. 539. Involved were a number of alien Chinese wives and minor children of domiciled Chinese merchants who arrived at San Francisco on July 11, 1924. With the question thus squarely before the court, the arrivals were held admissible under the treaty, unaffected by the Act of July 1, 1924, the language of the court being:

> "An alien entitled to enter the United States 'solely to carry on trade' under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act No. 3(6), and therefore is not absolutely excluded by Section 13. (1) The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the Treaty of 1880 and certainly possessed it prior to July 1st when the present Immigration Act became effective. *United States v. Mrs. Gue Lim, supra.* That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry. * * *
>
> "They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court 25 years ago."

In harmony also have been other court expressions on the question.

> "Immigration Act of 1924 does not destroy existing treaty rights."
>
> *Dang Foo v. Weedin*, 8 F.(2d) 221.
>
> *Ex parte Goon Dip*, 1 F.(2d) 811.

> "Aside from the duty imposed by the Constitution to respect treaty stipulations when they

become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. * * *"

Chew Heong v. United States, 112 U.S. 536 28 Law ed. 170.

And in the same case the court said, at page 559:

"Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

Following that quotation the court, in the same case, gives it this application:

"We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provision of the treaty."

Haff, Commissioner, v. Yung Poy, 68 F.(2d) 203, completely negatives appellant's contention that appellee should be denied the benefit she here seeks because her admission was subsequent to the Act of 1924. In that case Yung Poy, Chinese, was admitted on June 2, 1926, as the minor son of a domiciled Chinese merchant. As in the instant case he was admitted after enactment of the Act of 1924, and, as here, his admission was recorded as under 6(3) of the Immigration Act of 1924. In 1932 Yung Hong, the father, lost his status as a domiciled merchant, whereupon the son was ordered deported on the

ground that he had thereby lost the status under which he was admitted. Under a court writ he was discharged, and the Government appealed on the grounds: First, that his rights were measured by the Immigration Act of 1924 and not by the Treaty of 1880 under which his father was admitted; and second, that one admitted under the Act of 1924 as the minor son of a trader became subject to deportation if the father cessed to carry on trade.

The court went into the question exhaustively, concluding its review of the authorities with this statement:

> "We cannot concur in the view that appellee's rights are measured by the Immigration Act of 1924 rather than by the treaty. The Act of 1924 abrogated the treaty only as to the provisions thereof inconsistent with the provision of the Act. * * * Concondant with the right granted by the treaty to Chinese merchants to freely come and go, the Act recognizes the right of an alien 'entitled to enter the United States solely to carry on trade in pursuance of the provisions of the treaty of commerce and navigation.' Section III(6) Act of 1924."

Corroborative of the point stressed throughout this brief, that appellee's status follows and is fixed by that of her merchant father's entry under the treaty, is this voluntary statement of the court in the above *Yung Poy* case: "What the rights of such aliens would be if *the merchant* had been admitted after the passage of the 1924 act is a question we need not consider" (Italics ours).

And finality is fixed upon the treaty as the deciding

factor in the instant case by this expression of the Supreme Court:

> "A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."
>
> *Chew Heong v. United States*, 112 U.S. 536, 5 S. Ct. 255.

So definitely divided by the treaty are the two classes (laborers, and "all others") that the latter may change their occupation within the classification, without losing their exempt status.

> "Chinese alien, entering the country under traveler's certificate *held* entitled thereafter to change status to treaty merchant under treaty with China of 1880."
>
> *Dang Foo v. Day*, 50 F.(2d) 116.

The court goes exhaustively into the question reviewing previous decisions concluding its review with this statement: "In view of these decisions we are of opinion appellee's right to remain in the United States is measured by the treaty and not by the Immigration Act of 1924, *even though he came here after the passage of that Act.*" (Italics ours.)

This case also squarely affirms our contention that appellee's rights here both of admission and of continued residence, are fixed by the status of the father unqualified by any purported restrictions incorporated in her certificate of arrival.

IN ANSWER TO APPELLANT

Throughout its brief appellant cites many cases of persons of nationality other than Chinese. These cases are of course not pertinent to the question here involved—of a nationality covered by special treaty regulation. This the appellant admits by the statement on page 24, that "appellee's status stems initially from Article II of the Treaty of November 17, 1880," followed by the statement that under the *Mrs. Gui Lim* case the right of entry of merchants "extended by necessary implication to the wives and minor children of Chinese merchants." And on page 26 is the further admission that "In enacting Section 3(6) of the Act of 1924, Congress did not seek to nullify existing treaties."

The authorities cited by appellant, as we interpret them, fall short of meeting the issue here. They do not overcome the fact that appellee was admitted for permanent residence under the Treaty of 1880, which permanency of residence was not limited by the Act of 1924 as our authorities clearly show; appellant attempting to fasten on such admission that "it must be admission as an immigrant" (Appellant's brief, p. 17) for which there is clearly no such requirement.

Many of appellant's cited adjudications (particularly on pages 22, 27 and 28, are of nationalities other than Chinese and are not protected by any treaty engagement, as is appellee, which distinction is admitted by appellant's statement on page 24 of its brief, that she was admitted under the treaty.

As to the cases mentioned on page 25: (Lo) Hop

was admitted as a merchant, then became a laborer under circumstances which established that he came in fraudulently. (Wing Sun) Fay, becoming a laborer soon after his admission as a merchant was taken into custody, charged with fraudulent entry, which charge the Department failed to prove, and he was discharged. *U.S. v. Duck* occurred prior to the Act of 1924. In *Yen v. Frick*, Yen, admitted as minor son of merchant, soon became a laborer and was proceeded against as a fraudulent admittee but was discharged for lack of evidence. Soon thereafter he became a public charge, and was deported on that ground.

From a careful analysis of appellant's cited cases, we are unable to find any which shake the legality or good faith of appellee's admission and continued residence. Many of them, and much of appellant's argument are on technicalities which we confess we cannot follow.

Appellant's brief, especially from page 8 on deals broadly with the general subject before the court, but we assume that its assignments of error on that page mark the limits within which its argument may be considered.

CONCLUSION

We have herein given the court the benefit of such light as has been made available to us through judicial adjudication and reasoning otherwise; and we respectfully submit that upon the record before the court, the decision of the District Court should be in all things affirmed.

FRED. H. LYSONS,
Attorney for Appellee.